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NOV 18 1963
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(1547)

Supreme Court of the United States

No. 593—October Term, 1963

EDWARD C. ST. CLAIR, *etc.*,
Petitioner,

against

YONKERS RACEWAY, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENTS STATE HARNESS RACING COMMISSION, STATE TAX COMMISSION, ARTHUR LEVITT, AS COMPTROLLER OF THE STATE OF NEW YORK AND LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK

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Pro se and as Attorney for State Harness Racing Commission, State Tax Commission, Arthur Levitt, as Comptroller of the State of New York, Respondents
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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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(1)

It is our view that the main burden of opposing the instant petition should rest on the six racing corporations, who would be directly affected by the reversal of the decision below. The State bodies and officials on whose behalf this short brief is filed are purely nominal parties to the action.

We submit that where a State tax law is attacked as violative of a provision of the *State Constitution*, no federal question is presented; and that the State has the power to limit the right to attack the law to persons upon whom the challenged tax is imposed. Hence no federal right of the petitioner is violated if he is denied the right to assail the tax through a taxpayer's action, using that phrase in the ordinary sense in which it is generally used.

(2)

The denial by the Court below of petitioner's motion to amend the remittitur so as to recite their ruling on the so-called federal question is persuasive, though not necessarily conclusive, evidence of the want of existence of a federal question. But in the case at bar it is entitled to conclusive effect because the brief of petitioner, as plaintiff-appellant in the Court of Appeals, set forth four "Points" in his brief, and not one of them deals even remotely with the United States Constitution. Their text will be found (slightly amplified) in the outline of appellant's argument prepared by the State Reporter, and found in the official report of the case. 13 N. Y. 2d 72. The editor of North-eastern Reports omits an outline of counsel's arguments (192 N. E. 2d 15).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: November 15, 1963.

Respectfully submitted,

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